

Exhibit 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HERMÈS INTERNATIONAL and)
HERMÈS OF PARIS INC.,)
)
Plaintiffs,)
)
vs.) No.
) 1:22-CV-00384-JSR
MASON ROTHSCHILD,)
)
Defendant.)
-----)

September 23, 2022
9:32 a.m.

Deposition of BLAKE GOPNIK, held at the
offices of Baker & Hostetler LLP, 45
Rockefeller Plaza, New York, New York,
pursuant to subpoena, before Laurie A.
Collins, a Registered Professional Reporter
and Notary Public of the State of New York.

A P P E A R A N C E S (NOTE ZOOM PARTICIPANTS) :

BAKER & HOSTETLER LLP

Attorneys for Plaintiffs

45 Rockefeller Plaza

New York, New York 10111

BY: GERALD J. FERGUSON, ESQ.

gferguson@bakerlaw.com

FRANCESCA ROGO, ESQ.

frogo@bakerlaw.com

LEX LUMINA PLLC

Attorneys for Defendant

745 Fifth Avenue, Suite 500

New York, New York 10151

BY: CHRISTOPHER J. SPRIGMAN, ESQ.

chris@lex-lumina.com

RHETT O. MILLSAPS, II, ESQ.

(via videoconference)

rhett@lex-lumina.com

1

2 A P P E A R A N C E S (continued):

3

4 ALSO PRESENT:

5 VALENTINE FADIE, ESQ. (Hermès)

6 (via videoconference)

7 ZEF COTA, Videographer

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2 THE VIDEOGRAPHER: Good morning. We
3 are going on the record at 9:32 a.m. eastern
4 daylight time on September 23rd, 2022.

5 Please note that the microphones are 09:31:55
6 sensitive and may pick up whispering and
7 private conversations.

8 Please mute your phones at this time.

9 Audio and video recording will continue
10 to take place unless all parties agree to go
11 off the record.

12 This is media unit 1 of the video-
13 recorded of Blake Gopnik taken for counsel --
14 taken for plaintiff in the matter of Hermès
15 International and Hermès of Paris, Inc., 09:32:23
16 versus Mason Rothschild, filed in the United
17 States District Court for the Southern
18 District of New York, Case Number
19 1:22-CV-00384-JSR. The location of the
20 deposition is 45 Rockefeller Plaza, New York, 09:32:46
21 New York.

22 My name is Zef Cota, representing
23 Veritext, and I am the videographer. The
24 court reporter is Laurie Collins from the firm
25 Veritext. 09:33:01

1 Proceedings

2 I am not authorized to administered an
3 oath. I am not related to any party in this
4 action, nor am I financially interested in the
5 outcome. 09:33:09

6 If there are any objections to
7 proceeding, please state them at the time of
8 your appearance. Counsel and all present
9 including remotely will now state their
10 appearances and affiliations for the record, 09:33:20
11 beginning with the noticing attorney.

12 MR. FERGUSON: Gerald Ferguson,
13 attorney for plaintiffs, with Baker Hostetler.
14 I'm joined by Francesca Rogo of Baker
15 Hostetler. And also participating remotely is 09:33:34
16 Valentine Fadie of Hermès International in
17 their legal department.

18 MR. SPRIGMAN: My name is Christopher
19 John Sprigman. I'm with the firm of Lex
20 Lumina. I'm here on behalf of the defendant, 09:33:47
21 Mason Rothschild. Participating with me on
22 line I believe is also Rhett Millsaps, also of
23 Lex Lumina.

24 THE VIDEOGRAPHER: Thank you. Will the
25 court reporter please swear in the witness, 09:33:57

1 Gopnik

2 and then counsel may proceed.

3 B L A K E G O P N I K ,

4 called as a witness, having been duly sworn

5 by the notary public, was examined and

6 testified as follows:

7 EXAMINATION BY

8 MR. FERGUSON:

9 Q. Good morning. Can you please state
10 your full name for the record? 09:34:13

11 A. Blake Gopnik.

12 Q. Dr. Gopnik, have you been deposed
13 before?

14 A. No.

15 Q. Have you ever testified in court 09:34:23
16 before?

17 A. No.

18 Q. Do you have an understanding of what's
19 going to be taking place at this deposition today?

20 A. I believe I do. 09:34:33

21 Q. And is that understanding based on
22 information provided to you in conversation with
23 the counsel representing you today?

24 A. Yes.

25 Q. I'm just going to review a few ground 09:34:44

1 Gopnik

2 contemporary art, art of the twentieth century.

3 Q. Are you referring to art critics?

4 A. I'm referring to art critics, some art
5 critics, some art historians, some artists. 12:06:17

6 There's a very large range within those categories
7 of people who are absolutely ignorant and people
8 who know a great deal.

9 Q. Would it be fair to say that this --
10 the statement in the first sentence of your first 12:06:46
11 paragraph is obvious to people who agree with you?

12 MR. SPRIGMAN: Objection,
13 argumentative.

14 A. No. There are people who disagree with
15 me for whom it would also be obvious. 12:06:59

16 Q. Are you saying that the statement in
17 the first sentence of your first paragraph
18 wouldn't be obvious to art critics who are
19 ignorant?

20 MR. SPRIGMAN: Objection. 12:07:16

21 A. Yes.

22 Q. As a layman is there any way for me to
23 determine which art critics are ignorant and which
24 ones aren't?

25 MR. SPRIGMAN: Objection. 12:07:30

1 Gopnik

2 A. Not for a layman, just as I wouldn't be
3 able to tell a knowledgeable sports reporter from
4 one who isn't knowledgeable.

5 Q. Are there any objective criteria that 12:07:53
6 can be used to distinguish a knowledgeable art
7 critic from an ignorant art critic?

8 A. I think if you looked at the course of
9 their career and saw if they were -- held
10 interesting, complex views about art, you'd say, 12:08:08
11 yes, this person is interesting and this other
12 person uses clichés, et cetera, and therefore is
13 not interesting.

14 (Discussion off the record.)

15 Q. Are you aware of any consensus among 12:08:57
16 art critics that the images in NFTs produced and
17 sold by Mason Rothschild find their natural and
18 obvious home among the artistic experience carried
19 out by modern artists over the last century?

20 A. There is no consensus among art critics 12:09:15
21 on pretty much any issue. For instance, I find
22 the Mona Lisa a fairly trivial object, and most
23 art critics would disagree with me.

24 Q. Referring to page 5, paragraph 11. The
25 first sentence begins, By the end of the 1960s, 12:10:02

1 Gopnik

2 Andy Warhol had filled New York galleries with any
3 number of projects that were clearly art.

4 Why were these projects clearly art?

5 MR. SPRIGMAN: Objection, misstates 12:10:27
6 this point only in part.

7 But go ahead.

8 A. Within the context of that moment,
9 there are expectations about what art might be in
10 that, you know, from let's say 1966, shall we say. 12:10:38
11 There were expectations of what you'd see in an
12 art gallery, and they fulfilled some of those
13 expectations.

14 Q. You used the passive voice there,
15 "there were expectations." Whose expectations are 12:10:56
16 you referring to?

17 A. The expectations of the art world at
18 that moment.

19 Q. And what was the art world at that
20 moment? 12:11:07

21 MR. SPRIGMAN: Objection.

22 A. That's a very hard question to answer.
23 I'm not sure I know the scope of it. Well, at
24 that moment I'm referring specifically to a
25 sophisticated audience within New York. That's 12:11:19

Gopnik

the only people he was speaking to at that moment.
So it would be people who went to galleries,
talked about art, bought art, wrote about art. He
would have been unknown to many other communities. 12:11:37

Q. Referring to paragraph 38 on page 17,
referring to the sentence towards the bottom of
the paragraph which states --

A. 38, it was?

Q. 38, yeah, 38, page 17. And the 12:12:40
sentence a little bit -- the second-to-last
sentence where it states, It is almost impossible
to imagine that Hermès would have chosen to create
similarly fur-covered purses or uterus bags as
Rothschild's earlier Baby Birkin project, whether 12:13:03
in reality or as NFTs in the coming metaverse.

When you state "it is almost impossible to imagine," who are you referring to there?

A. I think anyone who's familiar with the
Hermès brand. 12:13:23

Q. You describe fur -- the fur on MetaBirkins as sheer absurdity. What is absurd about fur on a Birkin?

MR. SPRIGMAN: Objection.

A. Birkins I would say in their classic 12:13:46

1 Gopnik

2 version are sleek objects, not objects -- I
3 believe that I've seen versions of the fur-covered
4 purses that, for instance, have camouflage on them
5 that are brightly colored that are my -- almost 12:14:04
6 anyone's estimation tacky. I think Hermès tries
7 to avoid tackiness.

8 Q. Would it change your opinion as to the
9 sheer absurdity of fur on Birkins if Hermès has in
10 fact made fur-covered bags? 12:14:31

11 MR. SPRIGMAN: Objection.

12 A. The specifics would be important, the
13 color of the fur, whether it covered the entire
14 bag or not, whether it looked as silly as Mason
15 Rothschild's fur-covered bags look. 12:14:42

16 Q. Let me show you two exhibits we have
17 marked as Exhibit 186 and 187.

18 (Exhibit 186, examples of Birkin bags
19 with fur, marked for identification.)

20 (Exhibit 187, examples of Birkin bags
21 with fur, marked for identification.)

22 A. I was given 26 as well. Did you want
23 me to have 26 as well?

24 Q. Oh, I apologize. No.

25 (Pause.) 12:15:35

1 Gopnik

2 this question that these bags have been marketed
3 and sold by Hermès. If their bags have been
4 marketed and sold by Hermès, is it absurd for
5 Birkin bags to have fur on them? 12:17:08

6 A. I'm sorry, I don't understand -- maybe
7 just because I'm not a lawyer -- what you mean by
8 "if." They either were or they weren't, and I'm
9 not clear. The answer is different depending
10 whether they were or weren't. 12:17:21

11 Q. I'm asking you to assume they were.

12 A. To assume --

13 Q. As an expert witness, I can ask you to
14 make assumptions. I can ask for hypothetical
15 questions. 12:17:30

16 MR. SPRIGMAN: I'm going to raise an
17 objection. Is there a time frame for the
18 marketing, since we're asking him to assume
19 something that is a fashion item and that goes
20 in and out of fashion? 12:17:36

21 MR. FERGUSON: You can state your
22 objections. I'm going to ask my question.

23 MR. SPRIGMAN: Okay. Good.

24 A. Why don't you read it to me again, just
25 so I'm very clear on it. 12:17:47

1 Gopnik

2 (Record read.)

3 A. It's a complicated question. Yes, I
4 would say it is absurd for Birkin bags to have fur
5 on them. 12:18:31

6 Q. Does the opinion you just expressed
7 reflect a consensus of art critics?

8 MR. SPRIGMAN: Objection.

9 A. There would be no consensus of art
10 critics around fur-covered Birkin bags. My guess 12:18:41
11 is I'm the only art critic who's ever encountered
12 the question of fur-covered Birkin bags.

13 Q. Your statement that fur on a MetaBirkin
14 is a sheer absurdity, does that reflect the
15 consensus of art critics? 12:19:04

16 A. Again, they would be unlikely to have
17 encountered it as an issue in their art criticism.
18 I would imagine that it would -- that many of them
19 would form the same opinion as me. I'm just of
20 course guessing at their opinions. 12:19:19

21 Q. You say that many -- you imagine that
22 many would form the same opinion as you. Do you
23 also imagine that there are those who would not
24 form the same opinion as you?

25 A. There always are art critics who form 12:19:35

1 Gopnik

2 different opinions from other art critics.

3 Q. Are -- I'm sorry, I didn't let you
4 finish.

5 A. I think I did. 12:19:44

6 Q. Are those the critics that are
7 ignorant?

8 MR. SPRIGMAN: Objection.

9 A. Some of them might be ignorant. Some
10 of them might be very intelligent and also wrong. 12:19:52

11 Q. Referring you now to page 17 of your
12 report.

13 A. Hang on. I've got so many documents.
14 Here we go.

15 Q. I apologize, I have the wrong page. 12:20:42

16 Referring to page 16, paragraph 36, the
17 first sentence. I'm referring to the first
18 sentence, which states --

19 A. I'm sorry, did you say 37 or 36?

20 Q. 36. 12:21:09

21 A. 36, sorry.

22 Q. I'm referring to the first sentence,
23 which states, At its most basic, the title
24 MetaBirkins does what titles in art most commonly
25 do: It indicates the subject of the artwork. 12:21:21

1 Gopnik

2 A. I hope so.

3 Q. Does that definition appear in any
4 texts that you consider authoritative?

5 MR. SPRIGMAN: Objection. 01:18:58

6 A. I have to admit it has never occurred
7 to me to look for a definition of art in an
8 authoritative text. I've been studying art for 25
9 years, and I feel that I have enough experience to
10 understand it. It is extremely difficult to 01:19:10
11 understand, so everyone will have to arrive at a
12 definition that makes sense, because it's such a
13 thorny question.

14 Q. Have you ever heard the expression "art
15 is in the eye of the beholder"? 01:19:24

16 A. One of the sillier expressions I've
17 ever heard.

18 Q. I think I know the answer to this
19 question. Do you agree with that statement?

20 A. That art is in the eyes of the 01:19:36
21 beholder?

22 Q. Art is in the eye of the beholder.

23 A. I think it's a meaningless statement,
24 so I can't agree or disagree with it. I'm not
25 sure what it means. 01:19:47

1 Gopnik

2 Q. In your experience do different people
3 have different views of what they consider to be
4 art?

5 MR. SPRIGMAN: Objection. 01:20:04

6 A. Yes, absolutely. In the general
7 community, that's certainly true.

8 Q. Could you elaborate on what you meant
9 by "general community" in your last answer?

10 A. I was just trying to clarify my answer, 01:20:20
11 that I can't speak for every single human being on
12 the planet, and I'm fairly certain that there is
13 nothing in the world that everyone agrees on. And
14 one of the things that they might not agree about
15 are art. 01:20:33

16 Q. If two art critics disagree whether a
17 particular item is art, is there an agreed-upon
18 method in the art criticism profession for
19 resolving that dispute?

20 A. No. I think most sophisticated art 01:20:58
21 critics would think it was probably irresolvable.

22 Q. Do you have a definition of business
23 art?

24 A. Yes.

25 Q. What is your definition of business 01:21:19

1 Gopnik

2 art?

3 A. Business art is art that engages
4 directly and powerfully with -- for want of a
5 better word, with business, with commerce, with a 01:21:31
6 wide range of activities that on the face of it
7 normally might seem as being essentially about
8 finances and commodities but in fact when
9 introduced into the discourse of art seem to have
10 a richer set of resonances. It's a way of using 01:21:46
11 art to look at the world of finance and business
12 by participating in it to a certain extent.

13 I'm sorry, it's a long-winded answer.

14 Q. Are there times when people participate
15 in the world of finance and business and they're 01:22:04
16 not engaging in business art?

17 A. Yes.

18 Q. How can you tell whether someone is
19 engaging in business art or not?

20 A. Through a larger set of contextual 01:22:16
21 clues that tell you, oh, this might be worth
22 looking at as an artistic activity; for instance,
23 in the case of Andy Warhol, because he's generally
24 regarded as an artist and presents himself as an
25 artist. 01:22:32

1 Gopnik

2 Q. What are other contextual clues that
3 let you know that business or financial activity
4 is in fact business art?

5 A. I'd put it the other way around. There 01:22:51
6 are often cues that tell you that there's
7 something that reminds you of art in this activity
8 that might otherwise seem to be business.

9 It goes both ways. There are things
10 that seem at first glance to be art but then have 01:23:03
11 a business component and things that have a
12 business -- seem essentially business that then
13 have an artistic component.

14 Either way you can be in the face
15 business art. 01:23:17

16 Q. Is the definition of business art that
17 you've provided generally accepted among art
18 critics?

19 MR. SPRIGMAN: Objection.

20 A. My definition was so, I'm sorry, but 01:23:26
21 loosely phrase that'd it's hard to say if -- it's
22 not like defining the meaning of a word in one
23 sentence. I think there'd be consensus that
24 there's a phenomenon where artists interact with
25 commerce and it's an important concept. 01:23:45

1 Gopnik

2 So, yes, in that sense people would
3 recognize that set of phenomenon, perhaps not a
4 particular wording in a particular one-sentence
5 definition.

01:23:55

6 Q. Are there any books or articles that
7 you're aware of that contain a definition of
8 business art that you agree with?

9 A. It's not a normal practice in the world
10 of art to begin with a kind of definition like 01:24:10
11 that. There are certainly books about the
12 practice that go on at some length about the range
13 of practice. There have been exhibitions and
14 books that are about this practice.

15 It would be unusual for someone like me 01:24:24
16 to say, Now I'm going to give you a definition of
17 the thing about which I'm speaking.

18 Q. Are there no books or articles that
19 you're aware of that contain a definition of
20 business art that you agree with? 01:24:41

21 MR. SPRIGMAN: Objection.

22 A. I do not know of any that contain a
23 definition of business art because, as I say, that
24 would be unusual in the rhetorics of art
25 discourse. That's just not what you do. So it 01:24:54

1 Gopnik

2 would surprise me if there was someone who said, I
3 am now going to give you a definition of business
4 art. That would seem lame within the context of
5 the -- the social context of art history. 01:25:03

6 I should say I'm excluding here the
7 things that I've written where I discuss business
8 art, which I tend to agree with.

9 Q. Fair enough.

10 Do you agree with the statement that 01:25:24
11 business art is the step that comes after art?

12 A. No.

13 Q. You don't agree with that statement?

14 A. No.

15 Q. Is that a statement that Andy Warhol 01:25:35
16 made?

17 A. It is a statement attributed to Andy
18 Warhol.

19 Q. Okay.

20 And is it your understanding that he 01:25:45
21 didn't in fact make that statement?

22 A. With Andy Warhol unfortunately it's
23 very hard to tell what he said and what he didn't,
24 because there's usually a -- his art was
25 collaborative in the extreme. So there's often a 01:25:57

1 Gopnik

2 team of people working on any of his projects,
3 including his literary projects. His texts are
4 often meant to mislead and to confuse as well.

5 Q. Do you have a belief as to whether Andy 01:26:18
6 Warhol made the statement that business art is the
7 step that comes after art?

8 A. It is present in texts that bear his
9 name.

10 I'm sorry if I'm being difficult about 01:26:30
11 this. But figuring out what Andy Warhol meant or
12 said is complicated.

13 Q. Understood.

14 Although you've spent as much time what
15 Andy Warhol meant or said as just about anyone out 01:26:43
16 there.

17 A. That's why it takes so long, because
18 it's complicated.

19 Q. And in your research have you drawn any
20 conclusions as to whether Andy Warhol made the 01:26:51
21 statement that business art comes after art?

22 A. My conclusions about that statement was
23 that it was actually component in his business art
24 practice.

25 Q. And what do you mean that it's a 01:27:11

1 Gopnik

2 component in his business art practice?

3 A. That is, Andy Warhol being a kind of a
4 trickster needed to pretend to be done with art in
5 order to become this new thing called a business 01:27:20
6 artist. So by saying it's the step that comes
7 after art, he was saying that -- well, there's two
8 things he was saying. One is that it's the latest
9 step in art, it comes after art because
10 traditional art was dead. In other words, he was 01:27:36
11 saying this is a knew avant-garde practice.

12 But he had to also present himself in
13 part as a businessperson, someone who was no
14 longer making art, in order for his business art
15 to have its maximum resonance and complexity, and 01:27:47
16 he did that reliably thereafter.

17 Q. Is making money an example of business
18 art?

19 A. Not in every case, no.

20 Q. Can making money be an example of 01:28:15
21 business art?

22 MR. SPRIGMAN: Objection.

23 A. Yes.

24 Q. In what circumstances is making money
25 an example of business art? 01:28:22

1 Gopnik

2 A. When it's incorporated into a practice
3 that where contextually you realize it has
4 resonance in -- when I was talking about the
5 definition of art, when it seems to have larger 01:28:35
6 resonance is something that can be discussed
7 outside of functional circles when it seems to
8 have a larger, I'm sorry to use the word, artistic
9 resonance, when there are clues that tell you
10 that's a useful way of considering it. 01:28:48

11 Q. What are the clues that tell you that
12 making money is business art?

13 A. When it seems to -- with that
14 particular act of making money seems to be part of
15 a transition that's a business art transition; 01:29:06
16 when it gets extra resonance in relationship to
17 history of other practices that are like business
18 art that involve those same sense of issues; when
19 there are contextual clues that tell you, wait a
20 minute, maybe this isn't straightforward, maybe I 01:29:23
21 need to think of this as a meta practice rather
22 than someone simply trying to make money.

23 Q. Are special training and qualifications
24 required to identify whether something is business
25 art or not? 01:29:43

1 Gopnik

2 A. Knowledge is required.

3 Q. What is the knowledge that's required?

4 A. You'd need to know something about the
5 history of art in general. That's true of every 01:29:52
6 work of art. To know if a painting is a work of
7 art or just a silly commodity, you will also need
8 to have background. Many paintings are not works
9 of art.

10 Q. What is the difference between a 01:30:07
11 painting that is a work of art and one that's just
12 a silly commodity?

13 A. A painting that is a work of art, as
14 per the definition I had, is something that
15 actually invites contemplation about the nature of 01:30:26
16 art, the nature of society, the nature of all
17 sorts of things. But it invites successful
18 contemplation, invites and repays successful
19 contemplation.

20 Q. Is working a form of business art? 01:30:54

21 MR. SPRIGMAN: Objection.

22 A. In some cases it might be; in some
23 cases it might not be. It's not true that all
24 work is business art.

25 Q. And in what circumstances is working 01:31:08

1 Gopnik

2 his goal is in making this claim, but obviously
3 not all work is art.

4 Q. Do you agree with his statement that
5 good business is the best start? 01:32:54

6 A. No, because I don't think that that is
7 in fact the gist of what he's actually doing, what
8 the work that sentence is doing. This sentence is
9 a work of art and can only be understood in the
10 context of other works of art. That's why I can't 01:33:12
11 either agree or disagree with it as a normal
12 statement that someone might make.

13 Q. What context do you need to understand
14 that the sentence is a work of art?

15 A. You need to understand the work of Andy 01:33:24
16 Warhol, the work of Marcel Duchamp, the work of
17 other artists working in what I call business art,
18 what is business art at this time in history.

19 There's a set of contexts that make you
20 realize, oh, what Andy Warhol is doing here is not 01:33:37
21 a normal statement about the nature of the world,
22 and everyone knows that Andy -- everyone knew at
23 the time that Andy Warhol made statements that
24 didn't make normal kinds of sense, because Andy
25 Warhol is an artist. 01:33:49

1 Gopnik

2 Q. Do you need specialized background and
3 training to understand that Andy Warhol is not
4 making a normal statement here?

5 A. Yes. 01:34:20

6 Q. And what's the background and training
7 you need?

8 A. I don't know that you need any
9 training. You need to understand a lot about art
10 and how art works. And that's true to understand 01:34:27
11 any work of art.

12 Q. Is creating a corporation business art?

13 MR. SPRIGMAN: Objection.

14 A. It can be.

15 Q. In what circumstances is creating a 01:34:53
16 corporation business art?

17 A. If it is done in a context where
18 there's sufficient cues to let you know that in
19 fact a more interesting way of looking at it, a
20 forta [phonetic] way of looking at it, would be 01:35:07
21 from an artistic point of view rather than not.

22 Q. Do you need specialized training or
23 education to recognize these cues that you just
24 referred to?

25 A. Again, not training, but you need to 01:35:17

1 Gopnik

2 understand what art is and how it works.

3 Q. How do you get this understanding of
4 what art is and how it works in order to see these
5 cues?

01:35:29

6 A. You look at a lot of art, you think
7 about a lot of art, you read about art, you
8 immerse yourself in the world, in this case, of
9 twentieth century art, in this case a particular
10 part of twentieth century art. Again, that's true 01:35:40
11 of every piece of sculpture and painting of the
12 entire history of western art.

13 Q. Can the public sale of works at an
14 auction be art?

15 MR. SPRIGMAN: Objection. 01:36:02

16 A. They can be. They rarely are, but they
17 can be.

18 Q. And in your report on page 13, you give
19 an example of an auction conducted by Damien
20 Hirst; is that correct? 01:36:19

21 A. That is correct.

22 Q. Referring to paragraph 28. And that
23 art auction, the act of the auction was art? Is
24 that what you're saying?

25 A. Yes. 01:36:34

1 Gopnik

2 Q. Did you need specialized training or
3 experience to recognize that the act of that
4 auction was art?

5 A. You do not need specialized training, 01:36:48
6 but you need general experience of the nature of
7 contemporary art and of twentieth century --

8 Q. Do you need to immerse --

9 MR. SPRIGMAN: Wait a second.

10 Q. I didn't read realize you hadn't 01:37:00
11 finished. I'll stop.

12 Do you need to immerse yourself in the
13 world of contemporary art to recognized that
14 Damien Hirst's auction in September of 2008 was
15 business art? 01:37:14

16 A. Yes.

17 Q. Do you know if there is a consensus
18 among art critics as to whether the activities we
19 just talked about -- creating a corporation,
20 public sale of works -- is there a consensus as to 01:37:43
21 whether those activities can be art?

22 MR. SPRIGMAN: Objection.

23 A. Again, there's no consensus among art
24 historians about anything, including whether the
25 Mona Lisa is art, so there cannot be a consensus 01:38:00

Gopnik

on this either.

Q. One last activity I wanted to ask you about. Can investing money in the stock market be business art?

01:38:11

A. Yes, there are important cases of that that have been documented.

Q. In what circumstance was investing money in the stock market business art?

A. There was a work I believe in 1968 or '69, several works, in fact, which were shown in an exhibition, and I think one of the was shown at the Whitney Museum of Art, that involved specifically that activity.

01:38:22

Q. As a nonspecialist looking at a business activity, how do I determine whether something is -- that activity is business or business art?

01:38:42

MR. SPRIGMAN: Objection.

A. You would have to look at -- well, as a nonspecialist, as I said, a nonspecialist has no sense of art. Most cultures don't have a concept of art. You already have to know a great deal of contextual information, contextual clues, to understand a painting is art. It's not a category

01:38:56

01:39:13

Gopnik

A. I am obviously speaking widely metaphorically here, and in writing this I'm sure I didn't think through it in great detail. I was trying to conjure an image.

02:29:23

But I assume that a certain kind of traditional Catholic once upon a time would have distinguished between Crowns of Thorns that were on Jesus's head at some point versus one that had been made later. But since I'm not at all convinced there was a Crown of Thorns on Jesus's head, it's an obviously very figurative way of speaking.

02:29:39

Q. And in the example you gave, the one that was made later was the counterfeit?

02:29:58

A. Yes, correct.

Q. I'd like to --

A. I want to clarify, I was speaking metaphorically.

Q. Okay.

02:30:16

I'd like to show you a document that has been previously marked as Exhibit 6.

MR. SPRIGMAN: I want one of these.

THE WITNESS: Yeah, I think they're great.

02:31:01

Gopnik

(Pause.)

Q. Have you seen this document before today?

A. I've not, no.

02:31:18

Q. Have you seen the shirt depicted in the -- the large shirt depicted on the first page of this document before today?

A. I don't believe I ever have, no.

When you say "large," is that a normal -- is not a normal shirt?

02:31:37

Q. Because there was a small blue shirt in the bottom corner, I was referring to the large white red shirt in the center of the page.

A. Got it.

02:31:59

Q. Are you aware that Mason Rothschild sold a line of classic collegiate apparel inspired T-shirts for art and fashion students?

MR. SPRIGMAN: Objection.

A. I'm not aware of that.

02:32:11

Q. I'd like you to assume in this question that the Parsons T-shirt shown in this document was created and sold by Mason Rothschild. Is this T-shirt art?

MR. SPRIGMAN: Objection.

02:32:57

1 Gopnik

2 A. As with anything else, I really would
3 normally like to study it in greater detail. But
4 my guess is that within the larger context of
5 Mason Rothschild, knowing about his MetaBirkins 02:33:08
6 project especially, this would very much seem to
7 indicate -- because he's touching on Central Saint
8 Martins Parsons, this would seem to set it within
9 an art world context. It seems to be an
10 intervention in art world discourse. 02:33:25

11 Q. Are you familiar with the Parsons
12 School of Design?

13 A. I am.

14 Q. Are you familiar with the logo -- let
15 me ask you, what is the Parsons School of Design? 02:33:48

16 A. Parsons School of Design is part of the
17 New School in New York. It's their design
18 component. It's a venerable design school.

19 Q. Are you familiar with the logo of the
20 Parsons School of Design? 02:34:05

21 MR. SPRIGMAN: Objection.

22 A. I'm not.

23 Q. I'm going to show you what we've marked
24 as Exhibit 194.

25 (Exhibit 194, printout from Wayback 02:34:21

1 Gopnik

2 those other works. In particular their pop art
3 qualities make you think immediately of Warhol and
4 his legacy.

5 Q. Is the fact that MetaBirkins were 03:30:58
6 traded and what that trading means part of their
7 status as business art?

8 MR. SPRIGMAN: Objection.

9 A. Yes, I would say they are. The one --
10 one -- not the only one but one component in 03:31:13
11 business art is the way in which it actually
12 participates in the financial world, just like the
13 investors, the artists who invest in money as a
14 form of art as an artistic medium in the late
15 1960s. That can be one component in business art. 03:31:27

16 Q. How is trading NFTs as a form of art
17 different from trading NFTs as a commercial
18 activity?

19 MR. SPRIGMAN: Objection.

20 A. The actual trading -- it's -- let me 03:31:46
21 think if I can say this clearly to you.

22 The act of trading you could say is the
23 art supply. So there are going to be people, for
24 instance, who might use oil paints to paint a wall
25 and they're not using it to make art. Other 03:32:02

Gopnik

people use oil paints to paint important,
interesting, philosophically complex objects.

Similarly, the act of trading NFTs
might be used as an art supply in business art. 03:32:13

But as with many, many aspects of business art especially, there are also practices that have nothing to do with the art world.

Obviously not every single transaction
on Wall Street is in fact participating in
business art, but some can be used as a medium, an
art supply for business art.

Q. How can I tell whether the selling of an NFT is a commercial transaction or business art?

03:32:43

A. You'd have to look at the larger context. For instance, you might choose to read my report for this case and decide if it seems credibly to participate in this larger discourse.

You might look at the way in which NFTs have been discussed, in fact, as art, which is quite important. Because NFTs have sometimes mistakenly discussed as art, the issue of art automatically arises.

That's not true of looking at football 03:33:07

1 Gopnik

2 games. No one is talking about whether or not
3 football games is art. No one is having lawsuits
4 about whether football games are art or not. That
5 is happening with NFTs. Therefore the issue of 03:33:18
6 art arises automatically.

7 Q. Why can't playing a football game be
8 business art?

9 MR. SPRIGMAN: Objection.

10 A. I didn't say it couldn't be. 03:33:35

11 The art world tends to have a limited
12 interest in football, however.

13 Q. What?

14 A. I said the art world has a limited
15 interest in football. 03:34:04

16 Q. Fair enough.

17 I show you what was --

18 MR. SPRIGMAN: Jerry, we've been going
19 about an hour and how long? -- five minutes?

20 THE VIDEOGRAPHER: 13 minutes. 03:34:22

21 MR. SPRIGMAN: An hour and 13 minutes.

22 Is now a good time for a break?

23 MR. FERGUSON: Sure.

24 MR. SPRIGMAN: Let's take ten minutes.

25 THE VIDEOGRAPHER: We're going off the 03:34:30

1 Gopnik

2 Q. And that this NFT is called
3 MetaBirkins.

4 Do you have an opinion whether based on
5 those facts this NFT is a work of art? 03:51:23

6 MR. SPRIGMAN: Objection.

7 A. I can never have an opinion about
8 whether something is a work of art based on such a
9 limited set of facts. It does seem to interact
10 with the other things that -- other Birkins I've 03:51:37
11 seen which in larger context do seem to be works
12 of art.

13 Q. What else would you need to know about
14 this -- what's depicted in this exhibit in order
15 to determine whether it's a work of art? 03:51:59

16 A. Well, among other things what I want to
17 do -- I guess I could do it right here. It seems
18 to be one of the other MetaBirkins covered with a
19 sheet, which would actually indicate to me more
20 rather than less that it's participating in a 03:52:15
21 larger artistic project.

22 It seems to be riffing on other items
23 from the MetaBirkins repertoire. And the pedestal
24 with a draped object on top of it very much refers
25 to statuary in the history of art. The act of 03:52:34

1 Gopnik

2 unveiling a statue is something that exists in the
3 history of art. So it seems very much to be part
4 of that discourse.

5 So, yes, the answer is I would say yes, 03:52:47
6 it does seem to be understood in an artistic
7 context.

8 Q. You talked earlier about how the
9 digital files associated with NFTs can change.

10 A. Yes, that's correct, can be changed. I 03:53:16
11 don't think they usually change spontaneously.

12 Q. Do you have any understanding as if at
13 any point since the MetaBirkin NFTs were first
14 offered for sale if the image associated with
15 MetaBirkins NFTs have changed? 03:53:40

16 MR. SPRIGMAN: Objection.

17 A. There would be no way for me to know
18 that. I would have to see the same digital file
19 at two periods of time and then do a forensic
20 analysis of whether a change had been made. 03:54:00
21 That's not part of my expertise.

22 Q. I'm going to represent to you when the
23 MetaBirkin NFTs produced by Mason Rothschild were
24 first offered for sale that the images associated
25 with the NFTs looked like the image in Exhibit 57, 03:54:20

1 Gopnik

2 and then they subsequently changed to look like
3 the image in Exhibit 206.

4 A. Sorry, 206. 206. Looking like one or
5 another of these? 03:54:39

6 Q. Yeah.

7 A. I don't -- I'm not sure that your
8 question is coherent or your claim is coherent.
9 Are you saying that the same digital file was
10 altered, that one NFT pointed to -- I'm just 03:54:51
11 wondering -- this is just for information, is that
12 what you're claiming or saying?

13 Q. What I'm saying to you is that the
14 digital file changed.

15 A. Associated with a given NFT? 03:55:03

16 Q. Yes.

17 A. And someone's made that determination?

18 Q. Yes.

19 A. Fine. I'll believe you. I have no
20 evidence to that effect or not. But if you're 03:55:13
21 going to assert that, that's fine.

22 Q. So my question is at the time the
23 MetaBirkins NFTs looked like -- were associated
24 with images that looked like Exhibit 57 --

25 A. Can I just clarify, I'm sorry -- 03:55:31

1 Gopnik

2 Q. Yeah.

3 A. -- that each of -- that there were a
4 set of NFTs that had digital images associated
5 with them, all of which looked more or less like 03:55:41
6 this?

7 Q. All of them looked like Exhibit 57,
8 that's correct.

9 A. The then the image to which attached
10 was changed in all cases? 03:55:51

11 Q. Yes.

12 A. Okay.

13 Q. At the time the image associated with
14 the MetaBirkins NFTs looked like Exhibit 57, was
15 the name MetaBirkins an artistic comment on the 03:56:02
16 images?

17 MR. SPRIGMAN: Objection.

18 A. Yes, because the artwork did not
19 consist in the images at one point in time, just
20 as at the beginning of a movie the name might not 03:56:22
21 be relevant to what's happening at the beginning
22 of the movie, but by the end of it is.

23 I would say MetaBirkins is a project
24 that endured over time, and the title is a
25 reference to what it meant over time, not just at 03:56:35

1 Gopnik

2 that one moment.

3 Q. You describe the MetaBirkin projects as
4 analogous to a movie.

5 (Pause.) 03:56:58

6 Q. If there are further changes in the
7 images associated with MetaBirkin NFTs, could that
8 impact your view as to whether the MetaBirkin
9 project is business art?

10 MR. SPRIGMAN: I'm going to object to 03:57:26
11 the foundation of any of this.

12 A. It's largely irrelevant. The specific
13 changes to the images don't have an effect
14 necessarily on whether it's business art or not.
15 Those are, as it were, aesthetic issues which 03:57:39
16 might or might not but probably wouldn't affect
17 their status or, for that matter, their function
18 as business art.

19 Q. Are you saying that aesthetic issues
20 are not relevant to a determination of whether 03:57:53
21 something is business art?

22 MR. SPRIGMAN: Objection.

23 A. In many cases not directly relevant to
24 whether it's business art. They might play a role
25 in the way it functions as business art, but they 03:58:05

1 Gopnik

2 try to complicated or -- what's the right word? --
3 make his financial situation more interesting.

4 So various different activities he has
5 are held by various firms, some of which I believe 04:26:46
6 can go bankrupt without necessarily affecting his
7 own finances. So he's -- his practice, especially
8 his business art practice, is disseminated among
9 lots of different firms.

10 I believe Science is in charge of 04:27:00
11 selling different Damien Hirst projects, as part
12 of his business art, among other things.

13 Q. And for any of his firms, does Damien
14 Hirst adopt the trademark of other companies?

15 MR. SPRIGMAN: Objection. 04:27:15

16 A. His firms. No. He may have works --
17 he does have works of art that reference other
18 people's trademarks. But, no, his firms do not.
19 I should say I believe he has works of art that
20 reference other trademarks. 04:27:33

21 MR. SPRIGMAN: So it's 4:27. How long
22 have we've been on the record all together?

23 MR. FERGUSON: If you want to take a
24 break now, I think I'm pretty close to being
25 done. 04:27:58

1 Gopnik

2 MR. SPRIGMAN: Yeah, I want to get the
3 answer first, and then let's figure out what
4 to do.

5 THE VIDEOGRAPHER: 5 hours and 40 04:28:03
6 minutes.

7 MR. SPRIGMAN: Okay. How much longer
8 do you think you have, Jerry, just out of
9 approximate?

10 MR. FERGUSON: I mean, I think if we 04:28:11
11 could take a break I could organize my notes.
12 I think I would have about ten minutes when I
13 got back.

14 MR. SPRIGMAN: Let's do it.

15 MR. FERGUSON: Okay. 04:28:20

16 MR. SPRIGMAN: Cool.

17 THE VIDEOGRAPHER: We're going off the
18 record at 4:29 p.m.

19 (Recess taken from 4:29 to 4:42.)

20 THE VIDEOGRAPHER: We're back on the 04:41:24
21 record at 4:42 p.m.

22 Q. Is adopting the trademark of another
23 company business art?

24 MR. SPRIGMAN: Objection.

25 A. It might or might not be. 04:41:57

Gopnik

Q. In what circumstances is adopting the trademark of another company business art?

MR. SPRIGMAN: Objection.

A. I would say that it would almost always be a component in business art if business art is at stake, that is, any artist who seemed to be engaged in a business art project might or might even -- I might say should adopt a trademark of another company because it makes clear the stakes involved, that he's edge gauging directly -- he or she, I should say, is engaging directly with the world of commerce. It would be a good sign of what's going on.

And it would also -- frankly one
purpose of business art in general is critical or
satirical, and it would piss off the people that
he's talking to and then they would probably do
things like sue him and increase the cultural
importance of the business art by virtue of the
attention paid to it, the mess it's caused, the
fuss it's caused.

Q. Is taking actions that cause you to be sued business art?

MR. SPRIGMAN: Objection. 04:43:04

1 Gopnik

2 A. They might or might not be, but they
3 might be a very useful and interesting component
4 in business art.

5 Q. Did Andy Warhol adopt the trademark of 04:43:20
6 another company?

7 MR. SPRIGMAN: Objection.

8 A. He certainly used the trademark of
9 another companies, and sometimes those other
10 companies were uncomfortable with that. Sometimes 04:43:31
11 they were flattered by it. And the same company
12 at one moment be flattered and another moment be
13 uncomfortable.

14 Q. Did he ever adopt the trademark of
15 another company? 04:43:45

16 MR. SPRIGMAN: Objection, vague.

17 A. I don't know what that means, adopting.
18 Did he literally try to trademark another
19 company's extant trademark? No. But his works
20 certainly were presented as though he was using 04:43:53
21 that trademark.

22 And they did cause confusion, useful,
23 powerful confusion, that was part of the reception
24 in the art critical world. That's one reason they
25 matter is because they confuse the difference 04:44:08

1 Gopnik

2 between art and nonart.

3 Q. Is creating confusion regarding whether
4 a trademark owner has authorized goods business
5 art? 04:44:32

6 MR. SPRIGMAN: Objection.

7 A. I'd have to see a particular instance
8 of it. It might very well be.

9 Q. In --

10 A. A component in business art. Nothing 04:44:48
11 freestanding is or is not business art. You'd
12 have to look at a larger set of art supplies that
13 go into a project to decide the extent to which
14 any one of them is necessary or interesting or
15 useful in determining creating that work of 04:45:02
16 business art.

17 Q. Did you review the plaintiff's
18 complaint as part of the documents you reviewed in
19 preparing for your report?

20 A. I did. 04:45:15

21 Q. Did you see the allegations that Elle
22 magazine and the New York Post and other
23 publications printed stories saying that
24 MetaBirkins were offered by Hermès?

25 A. I don't remember your complaint in 04:45:30

1 Gopnik

2 There's usually -- it takes a bunch of
3 different people to finally come up with something
4 out there. I assume there's a technician to mount
5 just in charge of literally mounting them on 04:50:58
6 whatever server they're living on.

7 Q. In your report you reference that you
8 had seen a number of documents that were -- that
9 have Rothschild Bates stamps. That all appears on
10 page 3 of your report. 04:51:13

11 A. Yes.

12 Q. A number of those documents you
13 reference -- in fact, I believe most if not all of
14 them -- involve communications with Mr. Rothschild
15 and Mark Design? 04:51:22

16 A. Yes, that's right.

17 Q. And do you have an understanding of the
18 role of Mark Design in creating the MetaBirkin
19 images associated with MetaBirkin NFTs?

20 MR. SPRIGMAN: Objection. 04:51:34

21 A. Yes, his role in the production of
22 them, I'd say.

23 Q. And what was his role in production?

24 A. Well, I'd have to look at them in
25 detail. He seemed to play several different 04:51:41

1 Gopnik

2 roles. He was in a rich, collaborative
3 relationship. He was functioning as a high-level
4 studio assistant. That's what studio assistants
5 do.

04:51:53

6 Q. Is business art recognized as a genre
7 in the field of art criticism?

8 MR. SPRIGMAN: Objection.

9 A. Yes, it goes by various different
10 names. Most genres do. It's also called commerce 04:52:49
11 by artist. Some people might call it a branch of
12 relational aesthetics. But it's well recognized
13 as a movement or component in the history of
14 contemporary art. There have been exhibitions
15 about it; there are books about it. 04:53:04

16 Q. Is commerce by artists the same thing
17 as business art?

18 A. There is no specific definition of
19 business art or of commerce by artists. There are
20 elaborate -- you know, there are a set of, as it 04:53:15
21 were, Venn diagrams.

22 Different people might have slightly
23 different ways. That's true of minimalism, pop
24 art. Name any kind of art you could name, and
25 there would be different ways of thinking about it 04:53:27

1 Gopnik

2 and cases that would or would not be included by
3 different critics and historians.

4 These names are all heuristics.

5 Q. What? 04:53:46

6 A. These names are all heuristics, as a
7 way of coming to grips with varied practices.
8 They have something in common.

9 Q. Do art schools teach a course called
10 business art? 04:54:10

11 MR. SPRIGMAN: Objection.

12 A. That's a good question. They should.
13 I don't know if any of them do. They might. I
14 don't know the curriculum of all art schools. I
15 would hope that someone does. 04:54:20

16 Q. Are you aware of any art school that
17 teach a course called business art?

18 A. I'm not aware of the curriculum of art
19 schools, so I'm not aware of one. But that
20 wouldn't surprise me. I also don't -- I really 04:54:32
21 don't know what art schools teach and what they
22 don't. I've never taught in an art school.

23 I would say that they almost certainly
24 do teach as part of the curriculum for conceptual
25 art. It would be inconceivable that a course in 04:54:45